regulating broadcast indecency, including the so-called contextual approach set forth in the 2001 *Indecency Policy Statement*.

Although the parties to the litigation briefed the question of whether *Pacifica* is still valid as controlling precedent, the Second Circuit said it was unnecessary to address that issue to decide the case.[32] Instead, it focused on the factors articulated in the *Indecency Policy Statement* and found that the FCC's approach to enforcement is unconstitutionally vague. *Fox Television Stations, Inc.*, 613 F.3d at 330 (asking whether *Indecency Policy Statement* "provides a discernible standard by which broadcasters can accurately predict what speech is prohibited"). *See also id.* at 329 ("the questions left unresolved by *Pacifica* are now squarely before us").

The court held that the FCC's enforcement actions under the criteria set forth in the 2001 *Indecency Policy Statement* chilled speech "at the heart of the First Amendment," finding "little rhyme or reason" to the Commission's decisions, leaving broadcasters "to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Id.* at 332, 335. The court was particularly critical of the Commission's inability to define when news programming would be subject to indecency penalties. Although the agency purported to be deferential to licensees' editorial judgments – and in some cases actually exercised deference – it specifically declined to create a news "exemption," and could not define the circumstances under which news programming would be acceptable. The court found that news faced the same uncertainty that had always affected

[32] The Second Circuit reviewed the vast changes in the media landscape that have eclipsed the rationale set forth in *Pacifica*, and noted that the Supreme Court "may decide in due course to overrule *Pacifica* and subject speech restrictions in the broadcast context to strict scrutiny." *Fox Television Stations, Inc.*, 613 F.3d at 327. Until that day, however, the circuit court decided to review the constitutionality of the FCC's enforcement standard under the strictures set forth in *Pacifica*. *Id.* at 329. Of course, enforcement actions like this one may reopen the broader question of *Pacifica's* continuing validity.

programs under the *Indecency Policy Statement* and cited numerous examples of news programs that had been chilled by the absence of a news exemption, or by discernible criteria cabining the Commission's discretion. *Id.* at 334-35.

b. The Commission Has Yet to Devise an Adequate Replacement for its Restrained Enforcement Policy

In this case, two years after the Commission opened a proceeding to ensure that its indecency enforcement policies "are fully consistent with vital First Amendment policies," *2013 Public Notice*, 28 FCC Rcd at 4082, it has announced its intention to impose the maximum fine permitted under the statute for a newscast. It proposes doing so using the same test for indecency that the FCC devised in 2001, that the Second Circuit held was impermissibly vague. *Fox Television Stations, Inc.*, 613 F.3d at 327. This is neither a clear standard for regulating speech, nor does it show the restraint that *Pacifica* requires.

Pacifica did not give the FCC *carte blanche* to find an indecency violation based entirely on its subjective analysis of "contextual factors." The narrow holding focused on the "specific factual context" before the Court and concluded only that "the Carlin monologue was indecent *as broadcast*." *Pacifica*, 438 U.S. at 734-35 (emphasis added). *See id.* at 732, 742 ("[o]ur review is limited to the question whether the Commission has the authority to proscribe this particular broadcast," in which "offensive words" were "repeated over and over"). Since *Pacifica*, the Supreme Court repeatedly has reminded the government that it cannot regulate speech absent clear standards that limit administrative discretion. *E.g.*, *Reno*, 521 U.S. at 872 (risk of discriminatory enforcement poses grave First Amendment concerns); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992) ("First Amendment prohibits the vesting of such unbridled discretion in a government official").

In particular, the Supreme Court has cautioned that complex regulations that employ multi-factor tests, coupled with the threat of heavy penalties, "function as the equivalent of a prior restraint." *Citizens United v. FEC*, 558 U.S. 310, 335 (2010). The Court has warned that because an administrative agency's "business is to censor, there inheres the danger that [it] may well be less responsive than a court ... to the constitutionally protected interests in free expression." *Id.* at 366. As a consequence, protected speech is chilled because "the censor's determination may in practice be final." *Id.* Given these concerns, and the FCC's history in this area, the Commission lacks any discernible standard to support the NAL against WDBJ.

C. As Applied to WDBJ the Proposed Fine Violates the First Amendment

1. The Proposed NAL is Anything But "Restrained"

Despite the fact that a restrained enforcement policy is constitutionally required, the FCC is proposing the maximum forfeiture permitted under the law for a momentary technical slip-up on a news program in a small market television station. Mindful of the First Amendment requirement, the NAL repeats the language of restraint like a mantra. *E.g.*, NAL ¶ 11 ("we proceed cautiously and with appropriate restraint"); *id.* (the Commission "'recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming"); *id.* n.37 (because of First Amendment concerns the FCC's definition of indecency "will be tempered by the Commission's restrained enforcement policy"); ¶ 17 (we proceed "with the 'utmost restraint' that the First Amendment requires for news programming"). But the Commission's actions drown out its words. As the Seventh Circuit observed in another case, when stripped of its "self-congratulatory rhetoric about how careful and thoughtful and measured and balanced" it has been, "the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin." *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d

1043, 1050 (7th Cir. 1992). Reviewing courts have no trouble seeing through such administrative paeans to First Amendment values that are "more ritual than real." *ACT I*, 852 F.2d at 1341.

Even the Commission appears to dismiss its own language about restraint. Its press release announcing the NAL observed that "[t]his enforcement action would be the highest fine the Commission has ever taken for a single indecent broadcast on one station." *News Release, FCC Plans Maximum Fine Against WDBJ for Broadcasting Indecent Programming Material During Evening Newscast* (Mar. 23, 2015). This boast is bolstered by the NAL. It notes this is the first time the FCC considered imposing the maximum fine under the BDEA, then proposes an "upward adjustment" more than forty-six times the base forfeiture amount of $7,000. NAL ¶¶ 25-26. This proposed action strains the meanings of both "adjustment" and "restraint."

The Commission claims that such action is necessary because the purported infraction of the rules is "extreme and grave enough to warrant a significant increase" in the base amount. But that characterization distorts what happened here. Whatever may be the merits of the FCC's indecency policy in other contexts, this is not a case of a "shock jock" intentionally pushing the boundaries of the FCC's limits on expletives. Nor is it a situation where a broadcaster intentionally aired extended scenes of graphic sexuality as if this involved a pay cable channel. Indeed, this is not a situation where the broadcaster intentionally aired anything offensive at all. It is a matter where a local newscast experienced a technical glitch that resulted in a momentary and inadvertent transmission of sexual imagery. It is regrettable and certainly worthy of the immediate remedial measures WDBJ implemented, but it is hardly the type of "egregious" case that the *2013 Public Notice* demanded but never defined.

The proposed NAL is anything but restrained in its subject matter as well. The Supreme Court has made clear that the "First Amendment requires a more careful assessment and charac-

terization of an evil" before the government may restrict "instances as fleeting as an image [of nudity] appearing on a screen for just a few seconds." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 819 (2000). Here, the FCC has announced its intention to impose the maximum fine in the two areas where reviewing courts have said the Commission's authority to restrict programming is at its lowest – newscasts, and inadvertent or accidental transmissions.

2. The NAL's Approach to News Programming Violates the First Amendment

In applying its indecency policies, the FCC has stressed that it is "imperative that we proceed with the utmost restraint when it comes to news programming" in light of "the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations." *Omnibus Indecency Remand Order*, 21 FCC Rcd at 11327. Here, however, the Commission claims there is no constitutional problem with imposing a fine on WDBJ because it "has explicitly ruled that there is no news exemption from the indecency law or Rule." NAL ¶ 20. True enough, the FCC has avoided creating a news exemption, but that is the problem, as the Second Circuit found, where the agency lacks any coherent explanation for when news can be subjected to indecency penalties.

The court cited examples of where news programming and public affairs programming had been censored, and noted that this problem resulted from the fact that the FCC considered the existence (or not) of a news exemption to be "a matter within its discretion." *Fox Television Stations, Inc.*, 613 F.3d at 334. It concluded: "If the FCC's policy is allowed to remain in place, there will be countless other situations where broadcasters will use their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment."

Id. at 335. The NAL not only ignores the court's decision in *Fox*, it rests on the same foundation that *Fox* rejected.

It also is inconsistent with the Commission's history of restrained enforcement. In light of the important First Amendment values associated with news programming, the Commission has historically given broadcasters an especially wide berth with respect to news coverage. *See, e.g.*, *Peter Branton*, 6 FCC Rcd 610 (interview with John Gotti that contained numerous uses of the word "fuck" and its variants not indecent when broadcast in a "legitimate news report"); *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd 930 (1987) (presence of potentially indecent material in a bona fide news program "of less concern" than in other contexts); *Pacifica Recon. Order*, 59 F.C.C.2d 892 ("we must take no action which would inhibit broadcast journalism"). The Commission did not punish the fleeting and isolated use of an expletive in a context of a news broadcast, even when the expletive was not a core part of the news report itself. *See Lincoln Dellar*, 8 FCC Rcd 2582 (MMB 1993) (news announcer's use of the word "fucked" not indecent "in light of the isolated and accidental nature of the broadcast").

The Commission tries to distinguish this case from others in which it has shown restraint by explaining that it avoided imposing fines in past cases where, on reconsideration, it "considered the context of the material as news as it had not done before." NAL ¶ 20 n.62 (describing reconsideration of NAL for *The Early Show*). But this is not what happened. The Commission initially found the *Early Show* broadcast particularly shocking (and therefore indecent) because it occurred in the context of news, but then reversed its decision *citing the same exact factor*. The Second Circuit singled out this flip-flop as one of the particular reasons it found the FCC's indecency formula to be unconstitutional: "the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason – that

the word 'bullshitter' was uttered during a news program." *Fox Television Stations, Inc.*, 613 F.3d at 332.

The Commission also tries to distinguish its NAL in this case by noting that the sexual material that was briefly displayed "is unrelated to the subject of the news report." NAL ¶ 20. This is just another way of saying that the extraneous material was included by accident.[33] Although the NAL intimates that WDBJ should not have included material from an adult-themed website, that is not an appropriate call for the government to make. There is no claim by the Commission – nor could there be – that WDBJ's inclusion of material that illustrated the young woman's past profession was unrelated to a legitimate news story. Nor can the FCC legitimately substitute its news judgment for that of WDBJ. The Second Circuit made clear that the Commission cannot leave such choices to its own discretion. *Fox Television Stations, Inc.*, 613 F.3d at 334-35. Accordingly, the NAL should be withdrawn.

3. The NAL's Approach to Fleeting Images Violates the First Amendment

This case presents the same constitutional question that arose in the consolidated cases that culminated in *Fox II*: Can the Commission, consistently with the restrained enforcement policy approved in *Pacifica*, penalize a broadcaster under its indecency rules for a fleeting, isolated, or inadvertent transmission of sexually-oriented material? The NAL cites only Chief Justice John Roberts' concurring opinion denying certiorari in the *Super Bowl* case as supporting authority, *see supra* note 15, but otherwise ignores the reasoning in *Fox Television Stations, Inc.*,

[33] For this reason, the FCC's hypothetical of showing sexual images on a split screen with a news story is beside the point. NAL ¶ 20. This is not a case in which the broadcaster intentionally selected unrelated sexual imagery and purposefully transmitted it adjacent to a news report.

613 F.3d at 334, that the First Amendment does not permit the government to impose a rule that requires 100 percent effectiveness in preventing inadvertent transmissions by broadcasters.

The error in the WDBJ news broadcast that prompted the NAL met all of the criteria for the FCC's former policy of restraint. It was fleeting (2.7 seconds and visible on only 1.7 percent of the television screen); it was inadvertent (accidentally included because of a technical problem); and it was isolated (one time event that was corrected without FCC intervention). Yet the NAL considers this worthy of a sanction – indeed, the most extreme sanction – because it claimed the station did not take "adequate precautions to avoid such a result." NAL ¶ 19. Such a standard fails to provide the necessary "breathing space" the First Amendment requires when the government regulates speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). These basic First Amendment principles fully apply in this case, because broadcasting is accorded the "widest journalistic freedom consistent with its public obligations." *CBS, Inc. v. DNC*, 412 U.S. at 110. Accordingly, "[t]o perform its statutory duties the Commission must oversee without censoring." *Id.* at 118. The NAL ignores these constitutional requirements.

4. The NAL's Application of the Indecency Guidelines Violates the First Amendment

The NAL purports to impose liability on WDBJ through an uncritical application of the test for indecency articulated in the 2001 *Indecency Policy Statement*. NAL ¶¶ 10-17. As explained above, however, that test has never been upheld, and has been found to be constitutionally defective by the only courts to review its merits. The court in *Fox* held that the standard set forth in the *Indecency Policy Statement*, together with its subsequent decisions, did not provide a discernible standard by which broadcasters could predict what speech is prohibited. *Fox Television Stations, Inc.*, 613 F.3d at 330.

This concern is borne out by the FCC's arbitrary application of the test's various factors in this case. It conflates the various parts of the test, ignores whether the material was "fleeting," and generally reserves for itself the ability to impose liability based on its overall impressions. *See supra* § IV. This is the very problem the court identified in *Fox*, when it held that the FCC failed to satisfy the First Amendment by merely parroting the various factors in its test, without finding a way to clearly and consistently apply them. *Fox Television Stations, Inc.*, 613 F.3d at 330. Accordingly, the Commission should rescind the NAL.

VI. THE NAL ARTICULATES AN ERRONEOUS AND UNCONSTITUTIONAL STANDARD FOR WILLFULNESS

The NAL violates the Communications Act insofar as it proposes to penalize WDBJ for an alleged indecency violation that was neither "willful" nor "repeated," as required by Section 503(b)(1).[34] This is evident from the fact that the only action the NAL found to make the broadcast sanctionable was not done knowingly. Given that indisputable fact, no reasonable construction of the term "willful" supports the NAL's conclusion, nor can a forfeiture be constitutionally imposed under the First Amendment.

The record confirms that WDBJ personnel were entirely unaware that the image in question would be seen in the coverage as broadcast. That image was not viewable by the photojournalist who assembled the story when he downloaded online images for it,[35] nor by the story reporter or newsroom managers who reviewed it pre-broadcast. WDBJ's editing and pre-broadcast monitoring tools at the time were legacy equipment, while the rest of its technology

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[34] *See* NAL ¶ 23 (citing 47 U.S.C. § 503(b)(1)). It is obvious the 2.7-second inclusion of the image of genital manipulation was not "repeated," and the NAL does not suggest otherwise.

[35] Indeed, as the NAL concedes, when the photojournalist producing the story went to the website of the distributor of the EMT's films to obtain pictures of her to use in the story, "only her face and shoulders can be seen." *See supra* 8.

supported wide-screen display, including the digital transmission facilities, HD encoder and master control facilities, and digital cameras. Meanwhile, production and review of news stories used monitors that displayed only 4 by 6 images and did not allow users to view parts of the widescreen image outside the area shown in the 4 by 6 monitor.

It is thus not the case, as the Commission suggests, that WDBJ personnel who assembled and reviewed the story "simply didn't notice" the fleeting image cited as sanctionable, NAL ¶ 29, but rather they *could not* have seen it in the story-creation and -review process – and there was certainly not awareness or intent that the broadcast include nudity or sexual conduct. Even if those involved had "been more alert," *id.* ¶ 24, they would not have recognized the inclusion of the problematic image. That perhaps explains why the NAL is reduced to assigning liability based on assertions that WDBJ "knew, or should have known, that its editing equipment … did not permit full screen review of material intended for broadcast," NAL ¶ 29; *id.* ¶ 24, and/or that it allegedly "omitted appropriate safeguards to assist it in making sure its audience was not subjected to" the material at issue.[36] It also explains why the Commission hedges its bets on willfulness, claiming that "[a]t the very least, the Station acted with reckless disregard." *Id.*

But it is not enough for the Commission to simply conclude, on this basis of oversight and inadvertence, that the broadcast was "willful." The Act requires that the "violation" itself be intentional. To be sure, the Commission has held that to satisfy willfulness, purported offenders need not intend to violate the Act or an FCC rule, or even be aware the action in question is a

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[36] *Id.* ¶ 24. The most the Commission can muster is an assertion that "in conjunction with [] failure to monitor the full content of the broadcast," WDBJ "aired the sexually explicit images." *Id.* ¶ 16. These negligence-based theories cannot suffice in the application of a criminal statue (as is the case with the FCC's indecency rule implementing 18 U.S.C. § 1464), as what WDBJ knew at the time "does matter." *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). *See also infra* 49-50.

violation.[37] But even the NAL notes that the Act defines "willful" as "conscious and deliberate commission or omission of any act." NAL ¶ 23 (quoting 47 U.S.C. § 312(f)(1), and noting its application to both §§ 312 and 503(b)).

Here, the question is not whether WDBJ intended to broadcast a newscast about a controversial EMT, or even whether it intended to show any of the websites that contained the offending image. The only question is whether WDBJ intended to depict the man's penis and his manipulation of it as part of the broadcast that aired. And all the evidence in the record indicates WDBJ not only formed no such intention, it did not even know the image was there until the broadcast aired. Significantly, the Commission must find "by a preponderance of the evidence," that the elements constituting violation of the Act or an FCC rule are present, NAL ¶ 23, yet the record points the opposite direction. Section 503(b)(1) thus precludes imposition of a forfeiture.

Any other reading of Section 503(b)(1) does not comport with well-settled precepts of what it means for actions to be "willful" – or constitutional limits imposed by the First Amendment. The textbook definition is that an action be "voluntary" or "intentional" to be "willful." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 n.3 (1998). In order "to establish a 'willful' violation of a statute, the Government must prove the defendant acted with the knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (internal quotation marks omitted). *See also Ratzlaf v. United States*, 510 U.S. 135 (1994).

As the Supreme Court reinforced just this Term, "wrongdoing must be conscious to be criminal." *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). "The central thought is that [one] must be blameworthy in mind before he can be found

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[37] *E.g.*, *Marshall D. Martin*, 19 FCC Rcd 20977 ¶ 8 (Enf. Bur. 2004). *See also* NAL ¶ 23 n.74 (citing H.R. Rep. No. 97-765, at 51 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2294-95). *But see* H.R. Conf. Rep. No. 97-765, at 51 (1982) (Section 503(b)(1)(B) requires the FCC to demonstrate that "the licensee knew that he was doing the act in question").

guilty, a concept that courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like." *Id.* Those upon whom the government wishes to impose liability under Section 1464 of the Criminal Code, and Section 73.3999 of the FCC rules, "must know of the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994)) (internal quotation marks omitted).

Such requirements clearly apply to the Communications Act. For example, one court held the 47 U.S.C. § 312(f)(1) standard for willfulness, which also governs Section 503(b)(1), *see supra* 47 (citing NAL ¶ 23), was satisfied when a party "*chose* to circumvent" the "governing legal standard."[38] Moreover, in criminal statutes, such as 18 U.S.C. § 1464, which provides the FCC's indecency enforcement authority, the term "willful" has been held to "generally mean[ ] an act done with a bad purpose ... without justifiable excuse ... stubbornly, obstinately, perversely." *United States v. Murdock*, 290 U.S. 389, 394 (1933) (citations omitted). Accordingly, "evil motive to do that which the statute condemns becomes a constituent element of the crime." *Screws v. United States*, 325 U.S. 91, 101 (1945). Even to the extent "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears," it at a minimum "denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *Bryan*, 524 U.S. at 191 & n.12 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). At a minimum, the level of volition that is required means the "accidental" inclusion of the fleeting image in question does not qualify.

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[38] *CBS Inc. v. PrimeTime 24 Joint Venture*, 9 F.Supp.2d 1333, 1343-44 (S.D. Fla. 1998) (emphasis added). *See also AT&T v. New York City Human Res. Admin.*, 833 F.Supp. 962, 974 (S.D.N.Y. 1993) (defining "[w]illful misconduct, in interpreting tariff, as the intentional performance of an action with knowledge" that the "act will probably result in injury or damage," or "in such a manner as to imply reckless disregard of the probable circumstances").

This interpretation is not only required by the Act, but is compelled as a constitutional matter in the context of sanctions that seek to punish expressive activity. The First Amendment requires statutory provisions imposing penalties on speech to be interpreted to include a scienter requirement. *E.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994); *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. 2002). *See Smith v. California*, 361 U.S. 147 (1959). The government cannot, as a general proposition, impose a strict liability requirement on protected speech,[39] and Section 503(b)(1)(B) must be interpreted in a way that avoids constitutional conflicts. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991). The FCC thus may not impose a fine where WDBJ did not know it would transmit "indecent" material. To paraphrase *Elonis*:

> [C]ommunicating *something* is not what makes the conduct wrongful. Here, the crucial element separating legal innocence from wrongful conduct is the [indecent] nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains [indecent material].

135 S. Ct. at 2011 (quoting *X-Citement Video*, 513 U.S. at 73) (internal quotation marks omitted). The record is abundantly clear that the necessary mental state was absent here.

The First Amendment compels a strict scienter standard for Section 1464 because "any statute that chills the exercise of First Amendment rights must contain a knowledge element."[40] In the defamation context, for example, the First Amendment requires proof that the actionable statement "was made with knowledge of its falsity or in reckless disregard of whether it was false or true" regardless of whether liability would arise under a criminal or civil law standard.

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[39] *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally-guaranteed freedoms of speech and press"); *id.* ("a rule of strict liability that compels a … broadcaster" to make "guarantees" as to its programming "may lead to intolerable self-censorship").

[40] *CBS Corp. v. FCC*, 535 F.3d 167, 201 (3d Cir. 2008) (quoting *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005)); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992)).

Garrison v. Louisiana, 379 U.S. 64, 74 (1964); *New York Times v. Sullivan*, 376 U.S. at 279-80. The *New York Times* standard specifically intended to "prevent undue 'chilling effects' on ... expression," and to protect all but "[t]he knowing and deliberate lie." *Pierce v. Capital Cities Commc'ns, Inc.*, 576 F.2d 495, 507 (3d Cir. 1978). The Supreme Court has equated this with the "familiar and workable standard" of "subjective recklessness as used in the criminal law." *Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994). Courts apply this standard in a variety of First Amendment contexts, particularly in cases involving laws analogous to Section 1464.[41]

The interplay of scienter and substantive First Amendment requirements determines whether a speech restriction provides sufficient "breathing space" for free expression, or is instead overly broad. *See, e.g., United States v. Alvarez*, 617 F.3d 1198, 1209 (9th Cir. 2010) (invalidating Stolen Valor Act and noting that, "[w]ithout a scienter requirement to limit the Act's application, the statute raises serious constitutional concerns"), *aff'd*, 132 S. Ct. 2537 (2012). In this regard, because speech restrictions must be applied narrowly, the constitutional validity of Section 1464 depends on a strict scienter standard.[42] The Commission's finding of liability and imposition of a maximum fine in the NAL here constitute the exact opposite of either a strict standard, or narrow application of limits on WDBJ's speech.

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[41] *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 115 (1990); *Hamling v. United States*, 418 U.S. 87, 123 (1974); *Ginsberg v. New York*, 390 U.S. 629, 644 (1968); *Mishkin v. New York*, 383 U.S. 502, 511 (1966); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 492-93 (1962); *Smith v. California*, 361 U.S. at 153.

[42] This dovetails with the Commission's formerly restrained indecency enforcement policy, in which it treated only knowing and intentional broadcasts as actionable. *See Pacifica Recon. Order*, 59 F.C.C.2d at 893 n.1 (finding it would be inequitable to hold a licensee responsible for indecent language when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing"). *See also Pacifica*, 438 U.S. at 733 (approving admonishment only for airing certain offensive words that were "repeated over and over" and "deliberately broadcast").

Finally, even if "reckless disregard" could be the proper standard, NAL ¶ 24 – which WDBJ does not concede – nothing short of criminal recklessness can justify a forfeiture under Section 1464, because it is a criminal law that regulates speech protected by the First Amendment. A person is reckless in the civil law context if he acts (or fails to act) in the face of "an unjustifiably high risk of harm that is either known or so obvious that it should be known,"[43] which is an objective standard, *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68-69 (2007), while in the criminal law context the government must prove "something extra." *Id.* at 60. That is, criminal law permits a finding of recklessness "only when a person disregards a risk of harm *of which he is aware*."[44] Not even an "extreme departure from professional standards," without more, will support a finding of recklessness. *Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001); *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 665 (1989); *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). "Unlike civil recklessness, criminal recklessness ... requires subjective knowledge on the part of the offender." *Safeco Ins. Co.*, 551 U.S. at 68 n.18. There can be no doubt that such "subjective knowledge" was entirely absent here, as not only does the NAL concede as much, it makes it the core of its theory of liability.

VII. EVEN IF THE COMMISSION COULD FIND THAT WDBJ VIOLATED THE INDECENCY POLICY, THE PROPOSED FORFEITURE SHOULD BE VASTLY REDUCED

The NAL erred in imposing the maximum possible forfeiture on WDBJ. WDBJ has demonstrated above that its fleeting and inadvertent broadcast of a sexual organ during a news

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[43] *Farmer*, 511 U.S. at 836. *Compare* NAL ¶ 24 (claiming that "the risk of airing of the indecent material on the ... news was clearly foreseeable").

[44] *Farmer*, 511 U.S. at 836-37 (emphasis added). This scienter requirement applies to "each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video, Inc.*, 513 U.S. at 72. *See Morissette*, 342 U.S. at 256. Without such a knowledge requirement, the law risks penalizing "a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985); *Staples*, 511 U.S. at 610.

program should not be held to have violated the indecency policy, either as that policy has been applied up to now, and most certainly as that policy must be interpreted under the First Amendment. Even if the Commission could, despite those constraints, find that WDBJ's broadcast was actionably indecent, any forfeiture imposed on WDBJ should be significantly reduced from the amount proposed in the NAL.

As the NAL recognizes,[45] the Commission's Rules establish a base forfeiture for indecency violations of $7,000. The NAL sets out various reasons – many of which are incorrect – for a larger forfeiture, but utterly fails to explain why it is appropriate to impose a forfeiture more than *forty-six times the base amount* for the inadvertent inclusion in a news program of a depiction of a sexual organ for less than three seconds.

The NAL cites the Broadcast Decency Enforcement Act of 2005 which increased the maximum forfeiture for broadcast indecency to $325,000.[46] Congress did not attempt to establish that amount *as the minimum* or even expected forfeiture, or to indicate any intent to override the Commission's normal discretion with respect to the amount of a forfeiture in any particular case. In its decision implementing the BDEA, the Commission understood the limits of Congress' action, and did not amend its rules to change the amount of the base forfeiture or indicate any change in its established approach to indecency violations. *Amendment of Section 1.80(b)(1) of the Commission's Rules*, 22 FCC Rcd 10418 (2007). The Commission thus did not assume that Congress' decision to increase the maximum potential punishment for the most serious violation of the indecency policy meant that the Commission should "throw the book" at

[45] NAL ¶ 25.

[46] *Id.*

every violation. But now the Commission apparently has changed its position without any notice to broadcasters.

The Commission in the NAL alluded to what it viewed as the "graphic" nature of the material broadcast as justification for a "higher forfeiture." NAL ¶ 27. Even if that were justified – and as discussed above, the fact that the scene was on-screen for less than three seconds, and visible only at the extreme edge of the screen, undermines the Commission's characterization – a "higher forfeiture" should not mean the *highest* forfeiture without some extraordinary evidence of intent or fault. That is particularly true since the video was shown during news programming which the Commission accepts is deserving of the highest protection under the First Amendment.

The Commission's efforts to establish culpability in the NAL also rest on incorrect assumptions. The NAL concludes, without any evidence in the record, that "the indecent material was plainly visible to the Station employee who downloaded it; he simply didn't notice it and transmitted it to Station editors who reviewed the story before it was broadcast." NAL ¶ 29. But as WDBJ has demonstrated, the "boxes" at the edge of the website were *not visible* to the employee who downloaded the material, and were likewise not visible to Station personnel who edited and reviewed the story.

Further, contrary to the assumptions in the NAL, WDBJ recognized the sensitive nature of the material and took particular precautions to avoid broadcast of inappropriate material, including blocking out website addresses and review of the story by two senior news personnel. The fact that they did not see the entirely unrelated "box" at the edge of the screen does not – contrary to the NAL – suggest culpability, but instead at most a mistake. An error – particularly

as in this case an error of which responsible personnel were entirely unaware – is not a reason for the proposed dramatic increase from the established base forfeiture.

The Commission also refused to credit WDBJ for its extensive remedial efforts, stating that "WDBJ was unclear on whether it took such measures before or after our investigation … and whether it continues to rely on staff or upgraded its equipment."[47] To the extent that the Commission had any doubts, WDBJ has now explained that it took remedial measures – including instituting new procedures for review of materials obtained from the internet and training sessions for news personnel – *immediately* after the broadcast. It also replaced its editing equipment at a cost of nearly $800,000 *before* it received any notice of the Commission's investigation.

Each of these incorrect understandings requires the Commission to reconsider the amount of any forfeiture. Further, if this brief, inadvertent exposure of sexual organ during a news program deserves the maximum punishment the Commission can hand out, what would the Commission do if a station intentionally broadcast a lengthy and explicit indecent program? Although the NAL includes a rote recitation of the "Commission's overall restrained approach to indecency enforcement,"[48] nothing in the NAL shows any effort to exercise restraint in dealing with a brief and inadvertent inclusion of unrelated video in news programming. The Commission must reconsider the amount of any proposed forfeiture.

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[47] *Id.* ¶ 31.

[48] *Id.* ¶ 32.

VIII. CONCLUSION

For the reasons stated above, the findings of liability and monetary forfeiture proposed in the NAL should be cancelled in their entirety. Should the Commission nevertheless impose a forfeiture, the amount should be drastically lower than the $325,000 proposed.

Respectfully submitted,

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APPENDIX A